1991

State of Utah v. Roy M. Helm : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ROY M. HELM,

Defendant-Appellant.

Case No. 14589

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE THORNLEY K. SWAN, JUDGE, PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Roy M. Helm, appeals from a judgment entered against him in the Second Judicial District of Utah, the Honorable Thornley K. Swan presiding, following a conviction for tampering with evidence.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty by a jury on March 26, 1976, of tampering with evidence in violation of Utah Code Ann. § 76-8-510 (1953), and sentenced April 19, 1976.

RELIEF SOUGHT ON APPEAL

The respondent seeks an order of this Court affirming the verdict of the jury and the judgment of the trial court.

STATEMENT OF FACTS

Respondent agrees with the statement of facts as submitted by Appellant.

ARGUMENT

POINT I

THE STATE DID PROVE ALL THE ELEMENTS OF ITS CASE AND THE COURT WAS CORRECT IN DENYING APPELLANT'S MOTION FOR DISMISSAL.

In order to satisfy its burden of proof, the State must present sufficient evidence to establish each element of the crime charged. Proper reading of the applicable statutes and careful examination of the testimony presented at trial necessitate the conclusion that the State carried its burden in the present case.

Utah Code Ann. § 76-8-510 (1973), reads in part:

> "A person commits a felony of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:
>
> (1) Alters, destroys, conceals or removes anything with a purpose to impair its verity or availability in the proceeding or investigation."

The first requirement for a person to be guilty of this crime is that he believes an official proceeding or investigation pending or about to be instituted.

Appellant's argument in regards to this requirement interprets the wording too compartmentally. The point at which an investigation ends and an official proceeding begins is not always clear and definite. The line appellant wants to draw between the two is not always present.

Appellant's argument also seems to ignore some basic facts of this present case. It is clear from the testimony of both Trooper Busch and Sergeant Hatch that Mr. Eccles had been arrested for driving under the influence of alcoholic beverages by Trooper Busch and that he had been taken to the Farmington Sheriff's Office for the purpose of being booked into the jail for this offense. Appellant was completely apprised of this situation by the time he arrived at Farmer's State Bank.

It is obvious that appellant, a Colonel in the Highway Patrol, knew that an official judicial proceeding

against Mr. Eccles would soon be instituted to adjudicate this charge. Appellant also knew that the evidence gathered by Trooper Busch would be essential for the purpose of the State proving its case in such a proceeding.

The narrow interpretation of the statute advocated by appellant is so restrictive that the purpose and interest of the statute would be defeated.

The second element of this crime, concealing or removing the materials, was satisfied when appellant retained the evidence which Trooper Busch had assembled. Appellant caused this evidence to be removed from the trooper and therefore removed it from the normal, procedural course it would have followed had appellant not intervened. The retension of this evidence is concealment due to the mere fact it rightly should have been returned to the trooper or turned in to be properly dealt with and filed.

> ". . . [I]ntent may be inferred from conduct of a defendant and from circumstantial evidence upon which reasonable inferences may be based." Deeter v. State, 500 P.2d 68 (Wyo. 1972); Stuebgen v. State, 548 P.2d 870 (Wyo. 1976); People v. Braly, 532 P.2d 325 (Colo. 1975).

Appellant questioned Trooper Busch as to whether or not anyone had seen Mr. Eccles being brought into the station; he recognized that proceedings were inevitable against Mr. Eccles unless he intercepted the damaging evidence; he reiterated, several times, that Mr. Eccles was a powerful person who could harm the Highway Patrol; he took control of the evidence that night and never returned it to the investigating officer.

All these facts lead to the reasonable inference that appellant removed and concealed this evidence for the purpose of impairing its availability at any future proceeding which would be instituted against Mr. Eccles in regards to this drunk driving charge. The motive for such action was to insure that Mr. Eccles would not retaliate against the Highway Patrol or individual officers. Although this intent was not obvious at the time appellant asked for and took the evidence, such intent is obvious when one views the totality of appellant's actions in regards to this evidence.

POINT II

TESTIMONY GIVEN BY STATE'S WITNESSES DID NOT REQUIRE CORROBORATION AND THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR DISMISSAL.

Utah Code Ann. § 77-31-18 (1953), states in part:

> "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself tends to connect the defendant with the commission of the offense. . . ."

Apparently it is appellant's argument that there was a conspiracy among appellant and State's witnesses and therefore the State's witnesses were accomplices of appellant. Both the basis and conclusion of this argument are fallacious.

Conspiracy is a specific intent crime. There was nothing said or done by appellant or State's witnesses which implied that any of them had the intent to make an agreement to conceal or remove the evidence. The troopers had no idea that appellant would consequently do just that. Without this intent, without an agreement, there could be no conspiracy.

The more relevant conclusion, however, is that State's witnesses were not accomplices of the appellant.

This Court has had several opportunities to define the meaning of "accomplice."

> "In this State we have no statutory definition of accomplice, but the court has construed the word to refer to one who is or could be charged as a principle with defendant on trial." State v. Coroles, 74 Utah 94, 277 Pac. 203 (1929); State v. Fertig, 233 P.2d 347 (1951); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972).

Utah Code Ann. § 76-2-202 (1973), spells out who can be guilty as a principle:

> "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct."

Again, the all important intent is lacking. These two troopers had no knowledge or

intent that the evidence would be kept and concealed by appellant, and, in fact, subsequently signed a complaint against Mr. Eccles on this charge (T.28). Although it was logical for the troopers to assume that appellant was going to give Mr. Eccles special treatment in this matter, it did not follow that he would break the law in doing so. They are guilty only of following orders--orders which were not patently criminal or wrongful. It is quite common and totally acceptable for an officer to permit a senior officer to intervene in particularly sensitive situations.

Since the State's witnesses lacked the necessary intent to be charged as a principle, they are not accomplices and their testimony is more than sufficient to sustain this conviction.

POINT III

THE LOWER COURT DID HAVE JURISDICTION TO SENTENCE THE APPELLANT.

Utah law requires that:

> "[A]fter a verdict of guilty if judgment is not arrested. . . the Court must appoint a time for pronouncing judgment, which must be at least two days and not more than ten days after the verdict." Utah Code Ann. § 77-35-1 (1953, as amended).

This statute presents the problem of determining whether the word "must" is mandatory or directory only. An analysis of cases through the years establishes the process through which this determination can most accurately be made.

In an early case the United States Supreme Court discussed the meaning of "shall" within a statute that said every probationer shall be given a hearing. The Court first considered the words alone and then considered the purpose of the statute.

> "The defendant shall be dealt within a stated way; it is language of command, a test of significance, though not controlling. . . Doubt, however, is dispelled when we pass from words alone to a view of the ends and aims." Escoe v. Zerbst, Warden, 295 U.S. 490 (1935) (Emphasis added).

The Court concluded that the purpose of the statute was to protect the defendant from malicious, ungrounded charges and therefore "shall" was seen as command language.

In State v. Nelson, 200 Kan. 411, 436 P.2d 885 (1968), the Kansas Supreme Court applied this same test to determine the meaning of a statute, similar to the one in question, which said "if motion for new trial is overruled, sentence shall be imposed within five days. . . ." They reasoned that:

> ". . . [w]hen the legislature prescribes a time when an official act is to be performed, the broad legislative purpose is to be considered by the courts whenever they are called upon to decide whether time prescribed by statute is mandatory or directory." Id. 887.

In viewing the statute they concluded the purpose was to "prevent prolonged, unreasonable delay in the sentencing of the defendant" and since the delay was not unreasonable, even though more than five days had elapsed, the court still had jurisdiction.

The Ninth Circuit concurred with this process when it stated:

> ". . . The interpretation of these words [shall and may] depends upon the background circumstances and context in which they are used and the intention of the legislative body or administrative agency which used them." United States v. Reeb, 433 F. 2d 381, 383 (Ninth Circuit 1970).

Even in the case of Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed.436 (1946), which the appellant cites for proposition that "shall" was a word of command and not advisory, the Court buoyed their definition by concluding that ". . . [r]easons of policy support this construction." Id. 486.

A singular look at the words of the statute in question would suggest that it is a mandatory time limit. However, it is important to take a further step and determine the legislative purpose for this statute. The purpose of the minimum limit is to mandate time for the judge to review the case and the defendant and determine an appropriate sentence. The purpose of the maximum limit is to assure that the defendant will not be unreasonably detained without any sentence. The reason for the delay in imposing the sentence in the present case was that the judge had not received a report from the Adult Probation Department. Without this report the judge could not make an intelligent assessment of the appellant and therefore could not impose a well determined sentence. The delay was for the benefit of the appellant in that it assured a fairer sentence.

This was especially true in this case because the appellant had not offered any evidence in his defense nor had he given his account of the situation. Without the report the judge had absolutely nothing by which to evaluate the appellant. Even the appellant's counsel recognized the importance of having available additional information at time of sentencing when he asked that the results of a polygraph test be made part of the file and taken into account when the judge decided on the sentence. (T.94).

When dealing with the meaning of this statute previously, this Court stated:

> "This court has held that the time fixed by the statute is not jurisdictional. . . and since it is regarded as merely directory the further provision that the judgment should be rendered within a reasonable time has been read into the statute." State v. Fedder, 262 P.2d 753, 755 (1953). In accord State v. Saxton, 30 Utah 2d 456, 519 P.2d 1340 (1974).

Considering the acceptable excuse for the delay it must be concluded that sentence was rendered

within a reasonable time and the court had jurisdiction to do so.

CONCLUSION

For the above reasons, respondent respectfully requests that the judgment of the lower court be affirmed.

Respectfully submitted,

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